IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

Nos. 375 and 376

NETTIE MEYER, ANNA JACOBSON, JACOB MEYERHOFF, JOSEPH MEYERHOFF, JULIUS MEYERHOFF, JOHN C PANKIN and RAY MANN,

Appellants,

vs.

KENMORE GRANVILLE HOTEL COMPANY, et al.,

Appellees.

On writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

I.

THE DECISION IN THIS CASE IS IRRECONCILABLE WITH THE OTHER DECISIONS OF THIS COURT.

The decision is *irreconcilable* with the decision in cases 428 and 533 rendered on the same day, and is *contrary* to the decision in *Continental Bank* v. *Rock Island* (294 U. S. 648) and to decisions rendered by the several Circuits, including the 7th Circuit Court of Appeals.

(a) The right to appeal from an order approving a plan of reorganization is well established and the opinion overlooked the adjudicated cases and the basic principle governing the right to appeal.

In *Continental Bank* v. *Rock Island, supra,* this court said: "A plan of reorganization when confirmed, *cannot be distinguished in principle from the composition with creditors.*" It there held that the approval of a reorganization constitutes a confirmation of composition in legal effect. It said: (p. 573) "With *due regard to consistency* the constitutional validity of one cannot be sustained, and that of the other denied." This *same consistency* must be applied in connection with the right to appeal from an order confirming a reorganization. The same Circuit Court of Appeals, which held in this case that an order confirming a reorganization in bankruptcy is not appealable, *had adopted the contrary view* in *In re: O'Gara Coal Co.* (260 Fed. 742). In that case *a plan of reorganization* was submitted to the Court of Bankruptcy, which plan of reorganization was approved, and a doubt arose whether the order was appealable as a matter of right or by a petition to revise. The appellants proceeded both ways. *The Seventh Circuit* dismissed the petition to revise and *held that the appeal was reviewable as a matter of right.* Judge Evans, speaking on behalf of the reviewing court, there said: (p. 744)

> "We are *convinced* that, notwithstanding the matter was brought to the attention of the court by the petition of creditors, *the proceeding was in the nature of a composition,* which, under section 14c of the Bankruptcy Act (Act July 1, 1898, C. 541, 30 Stat. 550 (Comp. St. No. 9598), *upon becoming effective, would operate* as a discharge in bankruptcy. As the granting or refusal to grant a discharge is by section

25a of the Bankruptcy Act (Comp. St. No. 9609) made reviewable by appeal, *we conclude the order here under consideration was properly reviewable by appeal. In re Friend,* 134 Fed. 778, 67 C.C.A. 500."

This citation escaped our attention when we argued the case here.

A similar decision was rendered by the 5th Circuit in *Hamilton-Brown Shoe Co.* v. *Berwold* (10 Fed. (2) 275). *This court denied certiorari* (271 U. S. 671). There, the court considered the question whether an *offer of compromise* (not a composition) was appealable. The court said:

"As will subsequently appear, the case presented is *not purely that of an administrative order*—the case must be considered as involving a *controversy* arising in Bankruptcy contemplated by 24a of the Bankruptcy Act, and appealable under the General Equity Jurisdiction of the Court."

When this court denied the application for the Writ of Certiorari it must have agreed with this view of the law.

The reason that an order confirming a composition is appealable is not because it constitutes a discharge, but because *"it results in a discharge."* (*Re*: *Gotlieb,* 262 Fed. 730, 732, 2 C.C.A.). The same reasoning should be applied to an order confirming a reorganization which *results* in a discharge.

This court distinguished a reorganization from a composition, because the former required additional steps and the latter was final. It overlooked that *in either case additional steps are necessary,* and in that sense neither order is final. Even in a composition there remain matters to be carried out subsequent to the confirmation (*Re*: *Everick*

Oil Corp., 39 Fed. (2) 765, 768, 2 C.C.A.). The discharge which follows a composition is without regard to the statute, which is superfluous. The discharge is "by operation of law" (*Re: Kornbluth*, 65 Fed. (2nd) 400, 402). The discharge in a reorganization under 77B also follows by operation of law, regardless of any special provision. The finality of an order is not determined by the entry of the discharge order, but *by the entry of the order of confirmation*, which results in a discharge. The order of confirmation of a reorganization is not any less final by the fact that *administrative matters are necessary to carry out its terms*, and that supplemental orders and decrees are necessary (*St. Louis Iron Mountain, et al.* v. *Southern Express*, 108 U. A. 24, 29). *A decree which determines the rights of the parties and leaves matters of administration and enforcement to the directions of the court by supplemental orders is appealable* because such matters are "mere incidents" to the "main relief" (*St. Louis Iron Mountain, supra*). The decree confirming the reorganization plan *adjudicated the whole controversy.* It approved the plan, directed the release of the two mortgages, the substitution of the other securities, and the matters that remained open *referred only to the enforcement and administration.* The reasoning of this court that the discharge would not follow if the order is not carried out equally applies to a composition, for there the court retains jurisdiction for six months, and if the composition is not carried out, it may also set it aside.

Mr. Justice Cardozo said in the *Broadway* case (decided simultaneously with this case, No. 533) that "the search at the moment is for a definition of an equity receivership that will *tend to minimize anomalies* and give *consistency and coherence to the statutory rule.*" This well applies here. It would be *inconsistent* to hold on the

one hand that an order on composition is appealable as a matter of right, and that an order approving a reorganization is not appealable, and is merely discretionary with the reviewing court. Under such reasoning *the facts in a reorganization proceeding could never be reviewed,* as the reviewing court is *confined to questions of law only.*

(b) An appeal from the final order of discharge would be useless and meaningless.

If it be true that no right to appeal from a reorganization plan exists, and that the only appeal lies from an order of discharge, then *an aggrieved party has no remedy.* Of what avail would such appeal be if prior to the appeal the securities are released and cancelled? Whether or not the appellant is successful in *the appeal from the discharge the released securities or the cancelled bonds* and the funds and expenses paid out in the course of the administration will not be restored to him. This especially applies to the instant case. Here, the alleged debtor was not obligated to pay the bond issue and never assumed it. Whether or not it would be discharged in bankruptcy would not in any way affect the mortgaged property, which was released by the order of confirmation as well as the mortgage debt. Section 77B was not confined to debtors who were personally indebted, but also applies to the debtors' property. A refusal to discharge a debtor is not a protection to the aggrieved security holder whose security was released and who was given questionable securities in lieu of his bonds.

II.

ACCORDING TO THE DECISIONS OF THIS COURT IN THE GRANADA AND BROADWAY CASES THE DISTRICT COURT WHOLLY LACKED JURISDICTION OF THE SUBJECT MATTER OF THIS REORGANIZATION, AND THIS DECISION WHICH DENIES THE RIGHT OF REVIEW TO ONE WHO HAS RAISED THE JURISDICTIONAL QUESTION THROUGHOUT THE PROCEEDINGS, WILL ADD GREATLY TO THE CONFUSION OF THE LAW, AND THEREFORE, A REHEARING SHOULD BE GRANTED.

In the two decisions rendered by this Court, simultaneously with the decision in this case, this court decided: (1) That a Trustee in possession is regarded as the owner, and therefore, cannot be deprived or ousted from possession by a proceeding under 77B, and (2) that 77B was not intended and does not apply to foreclosure proceedings, (3) that the jurisdiction of the District Court under 77B is not any greater than an equity receivership, and if the State Court acquired jurisdiction, the District Court has no right to interfere with its proceedings to oust it of the *res,* (4) that an involuntary proceeding cannot be based on a mortgage foreclosure which is not an equity proceeding, and such a petition does not confer jurisdiction. In the light of these decisions we fail to see how the present decision may stand.. Not only will it not "tend to minimize anomalies", but will greatly add to the confusion.

Here, two trustees were in possession since 1925 under separate bond issues executed by separate corporations. Foreclosure decrees were entered in each case in the years 1931 and 1932. Under one decree the statutory period of redemption expired, while under the other decree the

statutory period of redemption was still in operation. The alleged debtor was neither a debtor nor a mortgagor, nor was it a functioning corporation. It was never in business, never in possession, and was born in order to carry through a fraudulent reorganization plan. The proceeding for corporation reorganization was *involuntary. No act of bankruptcy was alleged. No equitable receivership existed.* The District Court *wholly lacked jurisdiction* of the subject matter according to the decisions of this court. Appellant, Nettie Meyer, initiated a proceeding in the State Court before this jurisdictionless petition was approved, *and moved for the appointment of a receiver.* Under the Act the District Court does not acquire jurisdiction until the petition is approved, so that the State Court *did acquire prior jurisdiction of the res* by the motion for the appointment of a receiver. Under the decree of this court the District Court *wholly lacked jurisdiction, its orders are a nullity and void.* Appellant moved for the dissolution of the injunction and the dismissal of the petition for want of jurisdiction. How this can be held to be a "proceeding" in bankruptcy and not a "controversy" arising in bankruptcy is beyond our understanding. The decisions upon which this court based its reasoning expressly distinguish between an appeal from an *administrative order,* which is a "proceeding" in bankruptcy, and an appeal from an order by an *adverse party,* which does not go to the administration of the estate. Here appellant *claimed adversely to the jurisdiction of the court.* This court concluded that no jurisdiction existed. Certainly such an order was appealable.

In a recent case decided by the Seventh Circuit (*Re: Tracey,* 80 Fed. (2) 9), the court concluded that a similar motion to dissolve and to dismiss the proceedings was appealable under 24a being a "controversy" and not a "proceeding" in bankruptcy.

The phrase "controversy" is limited to cases where third parties claim not in and under the administration of the bankrupt's estate in bankruptcy, but on the contrary assert *some right hostile to the title of the trustee or going to the right of the court to administer the particular estate in the bankruptcy case.* (*Snow* v. *Dalton*, 203 Fed. 843 (C.C.A. N.C.)

Appellant contested the right of the bankruptcy court to administer this property on the ground that the alleged debtor was neither debtor, owner, or mortgagor, but a *myth.*

The court did not permit the writer to argue the merits of the case orally, yet in its decision it considered the merits when it concluded (*a*) that the subject matter involved in the State Court came within the term of "Proceeding in bankruptcy," and (*b*) that the merits did not justify "to invite the exercise of discretion" to allow an appeal. We contended on oral argument that the merits of the case should be argued in order to determine these issues. The decision misconceived certain facts due to the denial to hear the oral argument on this subject matter.

The record presented a case where two trustees, officers of the house of issue, were in possession of the two properties on which separate bond issues were made for $1,000,000 each, but were in fact, operated as one unit. Because of defaults the trustees were in possesion since 1925, collected the income, and paid it over to their company, the house of issue, for moneys advanced during the years 1925 to 1931 on defaulted bonds and coupons. The house advanced this money in order to conceal the facts from the investors that the defaults existed since 1925. Thereby it was enabled to stay in business, to sell securities to the investors under the slogan that "Not a single dollar was ever lost" to the investors. The trustees were so

grossly negligent in paying over the funds to their company that they even failed to protect the property against the taxes and penalties, which resulted in sales, forfeitures, and the appointment of a tax receiver. Appellant, Nettie Meyer, brought her suit to *hold the two trustees personally liable for malfeasance and misfeasance,* and to have the house of issue and its officers account for all the funds which were wrongfully diverted, including it sought infective relief against a fraudulent reorganization. *A suit of this nature is wholly foreign to bankruptcy* proceedings and a reorganization plan of the debtor's property has no bearing upon the issues raised in the State Court. If this decision remains unchanged, the injunction issued in the District Court will permanently prevent such action against these trustees. At best, the 77B proceeding constituted an equitable receivership (see decision in Case 533). Here, the State Court aequired *prior* jurisdiction of this subject matter before the petition was approved. The whole subject matter in the District Court is not within the scope of 77B, and the Court's order was wholly void for want of jurisdiction, yet this court arrived at the conclusion that no appeal lies from a proceeding which is wholly void, and the parties are permanently enjoined from proceeding with their cause. Such a decision will add to the confusion on questions of jurisdiction and Appellate procedure, and this court should give due consideration to the petition for rehearing before the decision will remain final.

III.

THIS COURT MISCONCEIVED THE RECORD WHEN IT STATED IN ITS OPINION THAT IT WAS NOT CONTENDED THAT THE ORDER WAS A CONTROVERSY ARISING IN BANKRUPTCY.

The statement of the court that "it is not contended that this order is one in a controversy in bankruptcy" is entirely due to a misconception of the record. Under Point III of the petition (page 16) this contention was made. Under Point I of the reply brief (pages 6 and 7) this contention was again argued. Subsequent to the filing of the reply brief, the Circuit Court of Appeals for the Seventh Circuit rendered an opinion which we supplied by a motion filed in this court. In view of all of these matters the court overlooked this contention.

For the foregoing reasons we believe that a rehearing should be allowed so that the law may be clarified, the inconsistencies minimized, and the complicated procedure concerning appeals will be once and for all fully settled.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

The undersigned, Meyer Abrams, one of the attorneys for the petitioners, does hereby certify that the petition for rehearing is presented in good faith and is not interposed for purposes of delay.

MEYER ABRAMS,
One of the Attorneys for the Petitioners.